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No. 03-691

In the Supreme Court of the United States

BENJAMIN EGWAOJE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its brief in opposition, the government makes two concessions that are vital to the disposition of this petition for certiorari. First, the government concedes that the federal courts of appeals have adopted different standards for determining whether a defendant has validly waived his right to counsel, with some courts of appeals requiring trial judges to conduct a detailed inquiry before finding a waiver and others (like the court below) allowing the validity of a waiver to be inferred from a defendant's conduct. Although the government contends that "[t]he fact that some courts of appeals have taken different approaches * * * does not support the petition for certiorari in this case," Opp. 11, the government freely acknowledges that at least one circuit would have reached a different outcome on these facts, *see id.* When a right as fundamental as the Sixth Amendment right to the assistance of counsel is involved, such a clear split in the circuits merits this Court's review.

Second, the government effectively concedes that this Court's recent decision in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), cast substantial doubt on the reasoning of *Faretta v. California*, 422 U.S. 806 (1975), which established the underlying Sixth Amendment right to self-representation at trial. Although the government does note that the *holding* of *Martinez* was that a criminal defendant does not have the right to represent himself on appeal, *see* Opp. 14, it is clear that the *reasoning* of *Martinez* swept far more broadly — so much so that three Justices each felt compelled to write separately to indicate either that they were unwilling to reexamine *Faretta*, or that they believed it was unnecessary to do so in that case. Unlike *Martinez*, this case squarely presents the Court with the opportunity to reconsider *Faretta*. Notably, in its brief, the government offers no defense of *Faretta*'s much-criticized rule. The time has come for this Court to revisit, and reverse, *Faretta*. Certiorari should be granted.

REASONS FOR GRANTING THE PETITION

A. THE CIRCUITS ARE SPLIT ON THE REQUISITE INQUIRY BEFORE A DEFENDANT CAN VALIDLY WAIVE HIS RIGHT TO COUNSEL AT TRIAL.

1. The government repeatedly (and correctly) notes that, in *Faretta*, the Court observed that a defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." 422 U.S. at 835 (internal quotation omitted). But the government errs by suggesting that the "colloquy" between the trial judge and defendant here — such as it was — was comparable to the colloquy held to be sufficient in *Faretta*. *See* Opp. 11. In sanctioning that colloquy, the Court not only noted (as the government emphasizes, *see id.*) that "[t]he trial judge * * * warned [the defendant] that he thought it was a mistake not to accept the assistance of counsel," *Faretta*, 422 U.S. at 835-36, but also emphasized (as the government conspicuously fails to note, *see* Opp. 11) that "[t]he trial judge * * * warned [the defendant] * * * that [he] would be required to follow all the 'ground rules' of trial procedure," *Faretta*, 422 U.S. at 835-36.[1] Because the district court in this case failed to engage even in a "*Faretta* inquiry," Opp. 13 — much less the more detailed inquiry required by some courts of appeals in the wake of *Faretta* — this Court's intervention is warranted.

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[1] The *Faretta* Court also noted that "[the defendant] clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel," 422 U.S. at 835, and that "the record affirmatively shows that [the defendant] was literate, competent, and understanding," *id.* As to the first consideration, we note only that there is some question as to whether Mr. Egwaoje wanted to proceed *pro se*, or whether he simply wanted a new appointed lawyer. *See* Pet. 5-6 & n.1. As to the second, this Court subsequently made clear that a defendant need only be sufficiently competent to stand trial in order to waive his right to counsel. *See Godinez v. Moran*, 509 U.S. 389, 399, 402 (1993).

Moreover, the government entirely ignores this Court's subsequent decisions characterizing *Faretta* as requiring a detailed inquiry before a defendant can waive his right to counsel. *See, e.g., United States v. Vonn*, 535 U.S. 55, 73 n.10 (2002) (citing *Faretta* for proposition that a defendant can choose self-representation only "after a warning from the court of the perils [it] entails"); *Patterson v. Illinois*, 487 U.S. 285, 298 (1988) (citing *Faretta* for proposition that "we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial").[2] Those decisions, too, suggest that the bare-bones inquiry conducted by the trial court here was insufficient.

2. With considerable understatement, the government acknowledges that "courts of appeals have taken somewhat different approaches in ensuring that a defendant's waiver is knowing and intelligent," with some circuits requiring an inquiry into the defendant's awareness of the risks of self-representation before a defendant can be found to waive the right to counsel, and others not. Opp. 9.[3] We note only that the government ignores the considerable divergence of views among the highest *state* courts on this question, *see* Pet. 14 n.3, 15 n.4, and somewhat imprecisely characterizes the position of one circuit.[4]

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[2] *Cf.* Br. of United States in No. 02-1541, *Iowa v. Tovar*, at 14-15 (Nov. 14, 2003) (quoting this language from *Patterson*, and the "eyes open" language from *Faretta*, but characterizing both as dicta).

[3] Although one circuit has held that a detailed inquiry is required under a "*Miranda*-style prophylactic approach," Pet. 10a (citing *United States v. McDowell*, 814 F.2d 245 (6th Cir. 1987)), another has stated that such an inquiry is constitutionally mandated, *see, e.g., United States v. Peppers*, 302 F.3d 120, 135 (3d Cir.), *cert. denied*, 537 U.S. 1062 (2002).

[4] The Tenth Circuit, like the Third and D.C. Circuits, has held that the absence of an inquiry "mandates" reversal of a finding of waiver, *see United States v. Padilla*, 819 F.2d 952, 959 (10th Cir. 1987), though it has indicated that such an inquiry need not be "thorough and formal," *United States v.*

Faced with this irreconcilable split in the lower courts, the government proffers three reasons that this Court should nevertheless deny certiorari in this case. All three reasons lack merit.

First, the government contends that "the record in this case leaves no reasonable doubt that the command of *Faretta* was fulfilled." Opp. 11-12.[5] But the government concedes, in the same breath, that the brief inquiry conducted by the district court would have been insufficient to support a waiver under the Sixth Circuit's approach — to say nothing of the similar approaches of other circuits. *See id.* at 11. In that inquiry, the district judge did nothing more than warn Mr. Egwaoje, in the most generic terms, about the dangers of proceeding with self-representation. *See* Pet. 3-4. He did not recite the charges against Mr. Egwaoje; did not inform Mr. Egwaoje of the sentence he faced if he was found guilty; and did not advise Mr. Egwaoje about the governing rules at trial. *See id.* Precisely because the inquiry here was so inadequate, this case provides the perfect vehicle for the Court to consider whether a trial court must conduct any inquiry at all — and, if so, how detailed that inquiry should be — before allowing a defendant to waive his right to counsel.

Second, the government suggests that this case is an "unsuitable vehicle" because the lower courts found that "petitioner sought to deliberately manipulate the system by engaging in a pattern of obfuscation and obstructionism." Opp.

Turner, 287 F.3d 980, 983 (10th Cir. 2002).

[5] The government's position in this case is arguably in tension with its position in *Iowa v. Tovar*, in which it stated that "[a] probing colloquy specifically directed at the consequences of self-representation may be necessary to ensure that a defendant who pleads not guilty and proposes to represent himself at trial has a constitutionally sufficient understanding of the potential effects of such a decision." Br. of United States in No. 02-1541, at 16; *but see id.* at 15 n.6 (stating that "[n]o *specific* colloquy should be required in all such cases") (emphasis added).

12-13 (internal quotation omitted). As a preliminary matter, it is unclear *why* the lower courts reached that conclusion: although Mr. Egwaoje had already had three different attorneys, two of those attorneys withdrew of their own accord, *see* Pet. 6a, and Mr. Egwaoje, while repeatedly asserting his right to a speedy trial, does not appear to have sought a continuance until the dispute arose with his third attorney, *see id.* at 6a-7a. Even assuming that Mr. Egwaoje *did* engage in "manipulative conduct," however, the existence of such conduct does not constitute a vehicle problem, but instead merely highlights the very split in the circuits that the government has conceded. Although the government cites various cases for the proposition that "[a] district court may infer that a defendant has knowingly and intelligently waived his right to counsel when the court finds that the defendant seeks to discharge his attorney in order to delay or to sabotage the trial," Opp. 12-13, all of those cases arose in circuits that have held that a district court need not engage in any inquiry before a defendant can be found to waive the right to counsel, and that the validity of a waiver can therefore be inferred from other evidence in the record, *see id.*[6] Conversely, those circuits that have required a district court to engage in an inquiry before finding a waiver have made clear that such an inquiry is required even when the trial judge suspects that the defendant is "attempting to disrupt the administration of justice by manipulative requests for, and dismissals of, counsel." *United States v. Welty*, 674 F.2d 185, 193 (3d Cir. 1982); *see also Buhl v. Cooksey*, 233 F.3d 783, 796 (3d Cir. 2000) (same). As the Third Circuit reasoned, "even well founded suspicions of intentional delay and manipulative

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[6] The government additionally claims that *Faretta* itself stands for the sweeping proposition that "a defendant may not use the Sixth Amendment right of self-representation to manipulate the trial system." Opp. 12 (citing *Faretta*, 422 U.S. at 834-35 & n.46). The cited portion of *Faretta*, however, stands only for the much more modest proposition that courts need not permit defendants who opt for self-representation to "use the courtroom for deliberate *disruption* of their trials." 422 U.S. at 834 n.46 (emphasis added).

tactics can provide no substitute for the inquiries necessary to protect a defendant's constitutional rights." *Welty*, 674 F.2d at 189. To the extent that Mr. Egwaoje engaged in conduct from which the validity of his waiver could be inferred, therefore, this case squarely presents the question whether a trial court must nevertheless engage in a detailed inquiry before such a waiver can be upheld.

Third, the government suggests that this case presents a poor vehicle because there was "overwhelming evidence" of the defendant's guilt. Opp. 15. The government does not contend, however, that any defect in Mr. Egwaoje's waiver of his right to counsel should be subject to harmless-error review. This Court has previously held that the erroneous denial of the correlative right to self-representation cannot be harmless, notwithstanding the fact that the exercise of that right "usually increases the likelihood of a trial outcome unfavorable to the defendant." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). *A fortiori*, the improper acceptance of a waiver of the right to counsel has the practical effect of totally depriving a defendant of the assistance of counsel at trial — which this Court has long noted, *see, e.g., Neder v. United States*, 527 U.S. 1, 8 (1999), and the government has long acknowledged, *see, e.g.*, Br. of United States in No. 03-167, *Benitez v. United States*, at 31 (Jan. 29, 2004), constitutes structural error. Accordingly, those circuits that require an inquiry have specifically held that failure to engage in that inquiry rises to the level of structural error. *See United States v. Stubbs*, 281 F.3d 109, 121 (3d Cir.), *cert. denied*, 535 U.S. 1028 (2002); *United States v. Allen*, 895 F.2d 1577, 1580 (10th Cir. 1990). At trial, Mr. Egwaoje presented no affirmative case, *see* Pet. 6; was repeatedly warned for improperly cross-examining witnesses, *see id.*; and received the maximum possible sentence under the Sentencing Guidelines, *see id.* at 9a. If Mr. Egwaoje had been provided counsel, therefore, that counsel could have investigated potential defenses, properly cross-examined the prosecution's witnesses,

and argued for a more lenient sentence. Because the deprivation of this assistance constitutes structural error, the supposed strength of the government's case against Mr. Egwaoje is ultimately irrelevant.

Almost two decades ago, two Justices urged this Court to intervene to resolve the circuit split on whether a detailed inquiry is required before a waiver of the right to counsel can be found. *See McDowell v. United States*, 484 U.S. 980 (1987) (White, J., joined by Brennan, J., dissenting from denial of certiorari). Since then, all of the remaining federal courts of appeals have addressed the issue, eliminating any need for further percolation. At a minimum, this Court should grant certiorari on the first question presented, and hold that the passing warning that Mr. Egwaoje received was inadequate to enable him knowingly and intelligently to waive his right to counsel.

B. THIS COURT SHOULD RECONSIDER ITS DECISION IN *FARETTA v. CALIFORNIA*.

1. The government opens its lukewarm defense of the *Faretta* rule by contending that "[t]his Court has on several occasions reaffirmed its decision in *Faretta*." Opp. 14. To be sure, this Court has in two cases *elaborated* on the *Faretta* rule, by holding that standby counsel may play a limited role when the right to self-representation is exercised, *see McKaskle v. Wiggins*, 465 U.S. 168, 176-88 (1984), and that a defendant may exercise the right to self-representation as long as he is competent to stand trial, *see Godinez v. Moran*, 509 U.S. 389, 396-402 (1993). None of the parties in those cases, however, appears to have suggested that *Faretta* should be overruled. Nothing in this Court's post-*Faretta* jurisprudence, therefore, should deter the Court from revisiting *Faretta* here.

2. The government correctly notes that, in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), this Court held that a criminal defendant does not have the right to

represent himself on appeal. *See* Opp. 14. In doing so, however, the Court did not merely conclude that "the justifications for the *Faretta* rule either do not apply at all, or apply with significantly reduced force, to the appellate phase of criminal proceedings." *Id.* Instead, the Court went out of its way to call those justifications into question across the board. Thus, the Court discounted *Faretta*'s historical evidence on the ground that "it pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime," *Martinez*, 528 U.S. at 156; it reasoned that, in light of the Court's decisions in *Gideon v. Wainwright* and related cases, "the original reasons for protecting [a] right [to self-representation] do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need * * * for self-representation," *id.* at 158; it disparaged *Faretta*'s analysis of the Sixth Amendment itself as "nontextual," *id.* at 160; and it concluded that "[n]o one * * * attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient," *id.* at 161. In fact, the Court's opinion in *Martinez* so plainly cast doubt on *Faretta* that three Justices wrote separately to distance themselves from the Court's approach — with Justice Kennedy stating that it was "unnecessary" to call *Faretta* into question in order to decide the case, *see* 528 U.S. at 164 (concurring opinion); Justice Breyer hinting that he would be willing to reconsider *Faretta* in an appropriate case, *see* 528 U.S. at 164-65 (concurring opinion); and Justice Scalia suggesting that the rule of *Faretta* was correct, but perhaps should have been grounded in the Due Process Clause rather than the Sixth Amendment, *see* 528 U.S. at 165 (opinion concurring in the judgment). Notwithstanding the fact that lower courts have faithfully continued to apply *Faretta*, therefore, the government cannot seriously deny that there is lingering uncertainty about the validity of *Faretta* in the wake of *Martinez*. *See* Opp. 14-15.

3. The time is ripe for this Court to revisit *Faretta*. In the

wake of recent high-profile cases involving *pro se* defendants, and even in the months since the petition for certiorari in this case was filed, legal and non-legal commentators alike have renewed their criticisms of the *Faretta* rule. *See, e.g.*, Editorial, *Fool for a Client (Cont'd)*, Wash. Post, Nov. 27, 2003, at A42 (contending that "the proliferation of high-profile self-representation cases should give the Supreme Court cause to rein in the right it declared in *Faretta*, which is long overdue for second thoughts"). Tellingly, the government offers no defense of the merits of the *Faretta* rule in its brief in opposition. *Cf.* Br. of United States in No. 02-1541, *Iowa v. Tovar*, at 16 (Nov. 14, 2003) (conceding that "there exists a strong consensus in the legal community that self-representation at trial is rarely in the defendant's interest"). Society has an undoubted interest in ensuring the fairness of criminal proceedings — an interest that extends well beyond merely ensuring that defendants do not disrupt court proceedings, *see* Opp. 15 n.4, to ensuring that defendants receive a properly contested, and therefore fair, trial.[7]

Finally, this case is a particularly apt vehicle for reconsideration of *Faretta* because Mr. Egwaoje plainly failed to conduct a serious defense. Although the government claims that "petitioner's educational background and experience with the criminal justice system belie the notion that he was incapable of conducting his own defense," Opp. 15 n.5 (citation omitted) — as if a high school education and history of guilty pleas were sufficient to prepare a defendant to conduct a federal criminal trial, *see* Pet. 11a — the government does not deny that Mr. Egwaoje's defense in this case was in fact egregiously deficient. Mr. Egwaoje was warned at least eleven times for asking irrelevant questions and making argumentative

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[7] That concern is particularly acute in capital cases, in which the right of self-representation has not infrequently been invoked. *See* Somini Sengupta, *Amateur Lawyers' Poor Record; History Is Discouraging for Suspect in a Capital Case*, N.Y. Times, Sept. 29, 1998, at B1.

statements during cross-examination; was ordered to "sit down" while he was making his opening statement; and was twice held in contempt for interrupting the trial judge. *See* Pet. 6. This case is the poster child for all that is wrong with the Court's decision in *Faretta*. The Court should grant certiorari on the second question presented as well, and overrule *Faretta*.

C. THE COURT NEED NOT HOLD THIS PETITION FOR *IOWA v. TOVAR*.

In the petition for certiorari, we suggested that the Court may wish to consider holding this petition pending its decision in *Iowa v. Tovar*, No. 02-1541 (cert. granted Sept. 30, 2003). In the three months during which the government was preparing its brief in opposition in this case, *Tovar* has been fully briefed and argued. In light of that briefing and oral argument, we now agree with the government that it is unnecessary to hold this case for *Tovar*. *See, e.g.*, Br. of United States in No. 02-1541, at 15 (noting that "[a] criminal defendant's decision to plead not guilty and to represent himself at trial * * * implicates quite different considerations than does the decision to enter an uncounseled guilty plea"). Because there is no risk that doing so would signal the outcome in *Tovar*, this Court should proceed to consider, and grant, the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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